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IN THE

Supreme Court of the United States

MARSHA OTTO, F. NAYLOR EMORY, DENNIS A. ERB, ROBERT K. GILBERT, JAMES W. LOSSELL, BARBARA J. MCALLEY, and WESLEY S. SEMPLE,
Petitioners,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, NATIONAL EDUCATION ASSOCIATION, and SHALER AREA EDUCATION ASSOCIATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the rule established by this Court in *Lehnert v. Ferris Faculty Association* that permits a state or national union to calculate its fair-share fee by pooling the expenditures it makes on behalf of the various bargaining units represented by its affiliated local unions contains an exception with respect to expenditures for litigation.

2. Whether the First Amendment requires a union that represents employees in several different professions to determine its fair-share fee by calculating the chargeable percentage of its expenditures separately for each such occupational group.

CORPORATE DISCLOSURE STATEMENT

Respondents Pennsylvania State Education Association and National Education Association are organized as nonprofit corporations. Neither has any parent corporation, nor does any publicly held company own any stock in either respondent.

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BRIEF IN OPPOSITION

Respondents Pennsylvania State Education Association, National Education Association, and Shaler Area Education Association respectfully urge the Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Petitioners are education employees in bargaining units represented by respondent Shaler Area Education Association ("SAEA") and by nonparty Grove City Area

Education Association ("GCAEA"),[1] who have chosen not to become dues-paying members of their unions. Petitioners are therefore required under the terms of Pennsylvania law and the applicable collective bargaining agreements to pay to SAEA or GCAEA, and their state and national parent unions—respondents Pennsylvania State Education Association ("PSEA") and National Education Association ("NEA")—a "fair share" fee that goes toward defraying the unions' costs of providing collective-bargaining services that benefit union members and nonmembers alike.

This Court has upheld against First Amendment challenges state statutes that permit public-sector unions to collect a fair-share fee (or "agency fee"), and at the same time has held that the First Amendment does prohibit unions from charging feepayers, over their objection, for the portion of union dues that goes for activities not germane to the union's collective bargaining function. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), the Court (i) set out the general standard for determining which union expenditures are chargeable to objecting feepayers, *id.* at 519;[2] and (ii) unanimously determined that as a general matter state and national parent unions may constitutionally calculate their fair-share fees on the basis of their pooled expenditures incurred on behalf of all of the bargaining units represented by their affiliated local unions, rather than only their expenditures incurred on behalf of each objecting feepayer's own bargaining unit. *Id.* at 522-24; *see*

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[1] GCAEA was dismissed as a party early in the proceedings.

[2] "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." In this brief, we refer in shorthand to expenditures meeting this test as "germane to collective bargaining."

also id. at 561-62 (Scalia, J., concurring on this point). It is this latter holding that is central to the issues presented here.

Notwithstanding *Lehnert*, plaintiffs brought this lawsuit alleging, in pertinent part, that PSEA and NEA had unconstitutionally based their fair-share fees on expenditures not constitutionally chargeable to objecting feepayers, including specifically (i) expenditures incurred by PSEA and NEA for germane-to-collective-bargaining litigation on behalf of bargaining units other than plaintiffs' units, and (ii) expenditures incurred by PSEA on behalf of affiliated bargaining units in the health-care—rather than the education—sector. We refer hereinafter to these two claims as the "litigation" issue and the "health-care employees" issue.

B. Like other unions, respondents fix their fair-share fees by determining which of their activities are chargeable and which are nonchargeable to objecting feepayers, and calculating the percentage of their prior-year expenditures that went for the former. That percentage, applied to the union's regular membership dues, yields the fair-share fee constitutionally chargeable to objectors.[3]

(1). In determining which of their expenditures are chargeable, PSEA and NEA apply the same standard to their expenditures for litigation as for all of their other expenditures: they treat as chargeable all litigation expenditures that are germane to collective bargaining and meet the general standard for chargeability set forth in *Lehnert*, and they treat as nonchargeable all litigation that is not germane to collective bargaining and does not meet that standard:

- Chargeable litigation includes, for example, expenditures for litigation to compel an employer to arbitrate grievances as required by a collective bargaining

[3] By statute, Pennsylvania limits the fair-share fee chargeable to *all* public-sector feepayers in a way that is roughly equivalent to the constitutional limitation for objectors. *See* 71 Pa. Stat. Ann. § 575(a).

agreement, to enforce an arbitrator's award under the collective bargaining agreement, or to defend against an employer's attempt to vacate an arbitration award, as well as litigation to compel an employer to comply with its legal obligation to negotiate in good faith for a collective bargaining agreement. The parties have stipulated that it is litigation of this kind that is at issue here.

- Nonchargeable litigation includes, for example, a legal challenge to a private-school voucher program or school-finance litigation.

In calculating the percentage of their total expenditures that is chargeable to objecting nonmembers, PSEA and NEA do not allocate their expenditures—whether expenditures for litigation or for anything else—among the hundreds (PSEA) or thousands (NEA) of bargaining units represented by their affiliated local unions. Rather, PSEA and NEA calculate the chargeable percentage of their expenditures, including litigation expenditures, on the basis of their pooled expenditures incurred for all bargaining units, in the manner generally approved by this Court in *Lehnert*.

(2) PSEA's affiliated local unions represent employees in three occupational groups: (a) teachers and other education professionals (103,712 employees in 608 bargaining units); (b) education support personnel (21,391 employees in 371 bargaining units); and (c) health-care professionals (1,548 employees in 6 bargaining units). PSEA provides generally the same kinds of services to all of its affiliated locals and to the members of their bargaining units, regardless of which type of employee the local union represents.

In calculating the percentage of its total expenditures that is chargeable to objecting nonmembers, PSEA does not allocate its expenditures among these three occupational groups and calculate separate chargeable percentages for each. Rather, PSEA calculates a single chargeable percentage based on all

of its pooled expenditures made on behalf of all of its affiliated bargaining units of education professionals, education support personnel, and health-care professionals.

C. Following the district court's denial of plaintiffs' motions to certify plaintiff and defendant classes, the parties reached a partial settlement that resolved all issues except plaintiffs' claims for declaratory and injunctive relief with respect to three discrete legal issues, including the two presented here. The parties also agreed to a stipulation of facts, on the basis of which these issues were presented to the court on cross-motions for summary judgment.

Adopting the recommendations of a magistrate judge, the district court granted summary judgment in favor of plaintiffs on the litigation issue and in favor of defendants on the health-care employees issue. Pet. App. 41a-48a. The Third Circuit reversed the district court's judgment on the former issue, Pet. App. 17a-25a, and affirmed on the latter, Pet. App. 25a-27a.

With respect to the litigation issue, the Third Circuit concluded that this Court's multiple opinions in *Lehnert* did not resolve this specific issue, and that in the absence of such authoritative guidance it should proceed by applying *Lehnert*'s general principles to the question presented. Taking that approach, the court below concluded that there was "no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses." Pet. App. 25a.

On the health-care employees issue, the Third Circuit stated the question before it as whether, "as a matter of law, . . . PSEA may pool costs across occupational groups." Pet. App. 26a. The court of appeals answered that question in the affirmative, explaining "that the *Lehnert* Court did not limit its holding [with respect to the permissibility of pooled expenditures] only to bargaining units within the same

industry, or within related industries." Pet. App. 27a. Rather, said the court, *Lehnert*

> stated a broad principle: "that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year."

Id. (quoting *Lehnert*, 500 U.S. at 523).

ARGUMENT

Petitioners seek review of the Third Circuit's holdings that (a) PSEA and NEA, as parent unions of their affiliated locals, could constitutionally calculate their fair-share fees by pooling their litigation expenditures incurred on behalf of various bargaining units, on the same basis as other types of union expenditures; and (b) PSEA could constitutionally calculate its fair-share fee by pooling its expenditures incurred on behalf of its affiliated bargaining units of education employees and health-care employees.

Both of the Third Circuit's holdings are entirely correct and neither calls for this Court's review:

- In a well reasoned analysis that is solidly based on this Court's teachings in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and its predecessors, the Third Circuit reached its ruling on the litigation issue through a sound application of *Lehnert*'s general principles. The court of appeals' decision is consistent with the emerging post-*Lehnert* consensus on this issue. *See Reese v. City of Columbus*, 71 F.3d 619, 623-24 (6th Cir. 1995); *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012, 1016 (7th Cir. 1998), *enforcing California Saw & Knife Works*, 320 N.L.R.B. 224, 237-39 (1995). While there was a scattering of early decisions to the contrary, none was fully reasoned, and none has proved to have any current purchase. Given the evolution of the law in

the lower courts, there is no live conflict that warrants this Court's attention.

- The Third Circuit's ruling on the health-care employees issue follows directly from *Lehnert*. The Petition's argument to the contrary is insubstantial and has no basis in *Lehnert* itself or in any lower court decision.

I.

The Third Circuit correctly resolved the litigation issue on the basis of *Lehnert*'s basic principles, and there is no need for this Court to review its decision.

A. In *Lehnert*, this Court upheld, as a general matter, the calculation by parent unions of their fair-share fees on the basis of pooled expenditures for all their local unions' affiliated bargaining units, because

> that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

500 U.S. at 523. That rationale supports treating as chargeable pooled litigation expenditures that are germane to collective bargaining, just as other pooled union expenditures that are germane to collective bargaining are treated as chargeable.

The stipulated facts of this case make it clear that the kind of litigation at issue here is part and parcel of unions' collective-bargaining and grievance-administration activities, and that this litigation is thus by definition chargeable to feepayers under *Lehnert*'s three-pronged test.

This litigation, the parties have stipulated, includes litigation to compel an employer to arbitrate grievances as required by a collective bargaining agreement, to enforce an

arbitrator's award under a collective bargaining agreement, or to defend against an employer's attempt to vacate an arbitration award; and litigation to compel an employer to comply with its legal obligation to negotiate in good faith for a collective bargaining agreement. Dkt. #102, ¶¶ 12-13; Dkt. #103, Exh. H-O. Indeed, the parties' stipulation frames the issue here as whether litigation costs unrelated to the individual nonmember's bargaining unit must be excluded from the union's fee calculation "even when reasonably employed to implement or effectuate the duties of the exclusive representative." Dkt. #100.[4]

Requiring an objecting feepayer to pay her share of the expense of such litigation has no greater impact on the feepayer's First Amendment rights than does requiring the objector to pay her share of the pooled cost of negotiating the underlying collective bargaining agreement, or of administering the contractual grievance arbitration system—as *Lehnert* holds is constitutional. That being so, it makes no sense to count as chargeable on a pooled basis the expense of negotiating a contract and of prosecuting and arbitrating a grievance alleging violation of the contract, but not the cost of suing to enforce the arbitrator's award or defending a suit to vacate that award.

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[4] The unions also incur litigation expenditures, often not directly related to any specific bargaining unit, in the interest of maintaining themselves as viable organizations—for example, litigating a slip-and-fall tort suit brought by a visitor to the union's office, a contract dispute with a building contractor or landlord, or an employment-related lawsuit brought by an employee of the union. This Court has made clear that expenditures incurred for that purpose are part of a union's duties as exclusive representative: "Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence . . . ." *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 448 (1984). The unions treat such litigation as part of their administrative overhead, a percentage of which is charged to nonmember feepayers.

What is at stake in a case like this one, then, is *not* whether the litigation at issue is "chargeable"—as we have noted, under *Lehnert*'s three-pronged test it clearly is—but rather whether a parent union's chargeable expenditures for litigation must be treated differently than all of its other chargeable expenditures, and allocated to each bargaining unit on behalf of which such litigation expense is incurred rather than pooled across all affiliated bargaining units.[5]

Justice Kennedy's *Lehnert* opinion aptly put the question as whether litigation should be "remove[d] . . . from the scope of the Court's holding that a local bargaining unit may charge employees for their pro rata share of the costs associated with 'otherwise chargeable' expenses of affiliate unions." 500 U.S. at 563. Justice Kennedy's answer to that question was that, under the fundamental principle of pooled expenditures on which all members of the *Lehnert* Court agreed, there was "no principled basis" for drawing such a line between litigation and other union expenditures. *Id.*

In the instant case the Third Circuit reached precisely that conclusion: "[W]e discern no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses. Thus we conclude that they are chargeable to SAEA's non-members." Pet. App. 25a.

B. Petitioners argue that the Third Circuit's conclusion is contrary to *Lehnert* and to the Court's earlier decision in *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984).

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[5] As a *practical* matter, of course, it would hardly be feasible administratively for unions like PSEA and NEA—with many hundreds or thousands of affiliated bargaining units—to undertake a unit-by-unit allocation of their litigation expenditures and calculate separately their fair-share fees for nonmembers in each such unit. In consequence, any holding that litigation costs must be allocated on a unit-by-unit basis would have the practical result of rendering it impossible for PSEA and NEA to charge nonmembers for any litigation expenditures at all.

As the Third Circuit noted, the paragraph of Justice Blackmun's *Lehnert* opinion that advocated a special unit-by-unit exception for "the expenses of litigation that does not concern the dissenting employees' bargaining unit," 500 U.S. at 528, represented the views of a plurality of four Justices and thus did not express the opinion of the Court. Pet. App. 20a-22a. And, as we develop in the margin, Justice Blackmun's view is not supported by any persuasive reason for deviating from *Lehnert*'s general principle permitting pooling of parent union expenditures.[6]

And, as the Third Circuit also held, Pet. App. 17a-19a—and as Justice Kennedy made clear in his *Lehnert* opinion—

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[6] Justice Blackmun based his view on the proposition that "extraunit litigation [is] more akin to lobbying in both kind and effect," given "the important political and expressive nature of litigation." *Id.* at 528. With all respect, that view rests on a misperception of the nature of the germane-to-collective-bargaining litigation that is the only kind of litigation at issue in a case like this.

Under *Lehnert*'s three-pronged chargeability test, 500 U.S. at 519, any litigation of the kind referred to by Justice Blackmun—litigation that is "akin to lobbying" and "political" in nature—will not be chargeable *at all* to *any* feepayers. PSEA and NEA do indeed engage in such litigation—lawsuits challenging private-school voucher programs or a state's system of school financing, to cite a few examples—and in conformity with the *Lehnert* chargeability test they treat such litigation as *nonchargeable*, even to feepayers within the bargaining unit on whose behalf such litigation was undertaken. With respect to this kind of "political" litigation, the question whether it can be charged to feepayers outside the bargaining unit on behalf of which it is undertaken never arises, because such "political" litigation is not germane to collective bargaining and thus is not chargeable *at all*.

Rather, the issue of "extra-unit litigation" arises only with respect to litigation that is germane to collective bargaining. And such litigation is no more akin to legislative "lobbying" and no more "political" than negotiating a collective bargaining agreement or invoking the agreement's grievance procedures—both of which are chargeable on a pooled basis under *Lehnert*'s general principles.

the Court's earlier opinion in *Ellis* "contains no discussion of whether a local bargaining unit might choose to fund litigation which is 'a normal incident of the duties of the exclusive representative,' [466 U.S.] at 453, through a cost sharing arrangement under the auspices of the affiliate." *Lehnert*, 500 U.S. at 564 (opinion of Kennedy, J.). This case thus "presents a significantly different question than *Ellis*." Pet. App. 18a.

The Third Circuit was, in short, entirely correct in concluding that it was "left without definitive Supreme Court guidance" on this question, and that the issue should be resolved on the basis of *Lehnert*'s general principles. Pet. App. 22a.

C. The Third Circuit's decision is consistent with the only recent court of appeals decisions—of the Sixth Circuit and the Seventh Circuit—as well as with the recent decision of the National Labor Relations Board ("NLRB"). Those four well reasoned decisions are, admittedly, contrary to three more cursory decisions that issued in 1991 and 1992 on the heels of *Lehnert*—one from the Tenth Circuit and two from state courts. But the earlier cases do not create a live conflict in the lower courts that warrants this Court's attention. The recent decisions represent an emerging consensus that so fully overrides the 1992 tentative view as to give confidence that if this issue were presented anew to those courts they would realign themselves with the position taken by the more recent decisions.[7]

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[7] As do petitioners, we note here cases decided under the First Amendment, the Railway Labor Act, and the National Labor Relations Act. Were one to consider only the public-sector cases decided under the First Amendment, the federal courts of appeals would be unanimous in permitting pooled litigation expenses, while two state court opinions containing little analysis would constitute the only authority reaching the opposite result.

In *Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995), the Sixth Circuit approved the pooling of litigation expenditures that were "directly related to grievance handling, the enforcement of the collective bargaining agreement and negotiating collective bargaining agreements." *Id.* at 623. While noting that *Lehnert* "did not have a holding on this precise issue," *id.* at 623, the court held that pooling litigation expenditures was constitutional by extrapolating from *Lehnert*'s holding with regard to pooled collective-bargaining-related expenditures generally. *Id.* at 623-24.

The Seventh Circuit, in *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), reached the same conclusion. Enforcing an NLRB order that upheld expense pooling generally and pooling of litigation expenditures specifically, the Seventh Circuit held that litigation expenditures were "analytically identical" to other union expenditures related to collective bargaining. *Id.* at 1016.

The NRLB, in the decision enforced by the Seventh Circuit, held that unions were not required to "segregate litigation costs on a unit-by-unit basis, as long as the categories of litigation charged to objecting employees are related to the union's basic representational functions, and are not the type of political extra-unit litigation that concerned the Court in *Lehnert*." *California Saw & Knife Works*, 320 N.L.R.B. 224, 239 (1995), *enforced*, 133 F.3d 1012 (7th Cir. 1998). Addressing Justice Blackmun's *Lehnert* opinion directly, the Board explained that "[t]he kinds of extra-unit litigation that we contemplate as being properly chargeable to objectors under a union-security clause would not be the kinds of lawsuits that are 'akin to lobbying.'" *Id.* at 238. The Board added that it would

> apply the same standard for determining the chargeability of litigation expenses as we are required by

> *Beck*[8] to apply to all other expenses—whether they are germane to the union's role in collective bargaining, contract administration, and grievance adjustment—regardless of whether the activities were performed for the direct benefit of the objector's bargaining unit.

Id. at 239.

Of the three earlier cases that reach the opposite result, only the Tenth Circuit's decision in *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1129-31 (10th Cir. 1991), contains any substantive analysis, and that analysis starts from an erroneous premise. The Tenth Circuit approached the issue as if *Ellis* were both the first and last word on the pooling of litigation expenditures, giving only a glancing nod to *Lehnert*—and then only to the litigation paragraph of Justice Blackmun's plurality opinion. The court of appeals both failed to appreciate that "*Ellis* . . . contains no discussion of whether a local bargaining unit might choose to fund litigation which is 'a normal incident of the duties of the exclusive representative,' . . . through a cost sharing arrangement under the auspices of the affiliate," *Lehnert*, 500 U.S. at 564 (opinion of Kennedy, J.), and failed to confront *Lehnert*'s unanimously adopted teaching with respect to expense pooling generally, much less explain why that teaching did not apply.[9]

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[8] *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[9] For example, the court noted that Justice Scalia would have "required 'a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit," 938 F.2d at 1130 n.4 (quoting 500 U.S. at 562), and concluded from this "that a majority of the Supreme Court would not allow ALPA to charge these litigation expenses to the plaintiffs." *Id.* In drawing that conclusion, the Tenth Circuit entirely missed the central teaching of *Lehnert*, which Justice Scalia articulated just two sentences further on in his opinion: "*It is a tangible benefit*, however, to have expert consulting services on call, even in the years when they are not used." 500 U.S. at 562 (emphasis added).

Two state courts—acting in the year following *Lehnert*—reached the same conclusion. *See Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App.), *adopted*, 594 N.E.2d 781 (Ind. 1992); *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992). But in both cases, the courts proceeded on little more than the assertion, unsupported by further reasoning or explanation, that Justice Blackmun's plurality opinion in *Lehnert* was "persuasive."

Since 1992, no court has followed the lead of these early cases, while three circuits and the NLRB have issued thoughtful decisions rejecting the position they took. The recognition of the more recently decided cases that, as the Third Circuit put it, there simply is "no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses," Pet. App. 25a, demonstrates a consensus that reflects the mature state of the lower courts' jurisprudence on this issue, that eclipses the early tentative contrary view, and that demonstrates that petitioners' claim of a live conflict in the lower courts is hollow.

II.

The second issue decided by the Third Circuit and raised by the Petition is whether, as a matter of law, the First Amendment requires a union that represents employees in more than one occupation or industry to calculate separately its fair-share fee for employees in each such occupational group by disaggregating its pooled expenditures and assigning each expenditure to the occupational group on behalf of which it was incurred.

The health-care employees issue is not, as petitioners would have it, whether the education professionals represented by PSEA local unions can "be required to pay the costs of representing public-and private-sector nurses," Petition at i, in the sense of "subsidization of the costs of

representing" them, *id.* at 30. As the Third Circuit observed, Pet. App. 27a, it is just as likely that the fair-share fee charged to education professionals like petitioners is *lower* because of PSEA's calculation of a single chargeable percentage based on aggregated expenditures than it would be were PSEA to calculate separate chargeable percentages for education and health-care employees.

Nor is there any issue here of whether PSEA has properly counted any specific expenditure as chargeable, or whether PSEA has made an adequate showing of the chargeability of any particular expenditure. All claims with respect to the accuracy of PSEA's calculation of its chargeable percentage for any year in the past were settled in the district court. Dkt. #100. The *only* health-care employees issue raised in this case—and the only such issue decided by the Third Circuit—is whether, as a matter of law, PSEA must calculate separate chargeable percentages of its expenditures on behalf of education employees and on behalf of health-care employees.

The Third Circuit held that, under *Lehnert*, PSEA could pool its expenditures across occupational groups. Pet. App. 26a. That holding is compelled by *Lehnert* itself and is consistent with the only other court of appeals decision in point. And petitioners do not even claim—nor could they—that there exists any lower court decision holding the contrary.

The claim petitioners raise here is in essence the same claim that was raised and rejected in *Lehnert*. The *Lehnert* petitioners argued that unit-by-unit allocation of expenditures should be required precisely because of the trend toward unions that represent workers in multiple industries, often in both the public and private sectors—among them the defendant unions in that case:

> Many national unions serve employees in more than one industry or occupation and in both the public and private sectors. There is a "steady trend toward" a smaller num-

> ber of larger internationals serving employees in "diverse parts of the economy." ... Respondent Michigan ("MEA") and National ("NEA") Education Associations are such "conglomerates," with locals of not only faculty in higher education, but also teachers in public elementary through high schools, educators in private and parochial schools, school secretaries, and school nurses.

Reply Brief for the Petitioners at 7-8 in *Lehnert* (No. 89-1217) (available on Lexis at 1989 U.S. Briefs 1217). Notwithstanding that the defendant unions thus represented bargaining units of not only teachers but also nurses, and employees in both the public and private sectors, this Court rejected the contention that the First Amendment required allocation of parent union expenditures on a unit-by-unit basis. 500 U.S. at 522-24.

Not surprisingly then, the only other post-*Lehnert* appellate decision that addresses this question comes to precisely the same conclusion as did the Third Circuit here. *See Finerty v. NLRB*, 113 F.3d 1288 (D.C. Cir. 1997) (holding that it was not unlawful for the Communications Workers of America to use pooled nationwide expenditures as the basis for calculating fair-share fees, notwithstanding that those expenditures were made for the benefit of employees in the telecommunications and printing industries, as well as in state and local government, in both the public and private sectors, and in Canada as well as the United States).

Having no other argument as to why the First Amendment prohibits the pooling of union expenditures for multiple occupational groups, petitioners assert that the unions have failed to show that PSEA's expenditures for bargaining units of health-care employees "may ultimately inure to the benefit" of bargaining units of education employees. Petition at 26 (quoting *Lehnert*, 500 U.S. at 524). That argument is specious.

The question here, as noted above, is purely one of law. It is stipulated that "PSEA provides generally the same kinds of services to all of its affiliated local associations, and to the members of their bargaining units, regardless of which type of employee the local association represents." Dkt. #102, ¶ 16. That brings PSEA's expenditures for health-care bargaining units within the ambit of *Lehnert*'s holding that "that part of the local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." 500 U.S. at 523. The affiliation fees that petitioners' local unions pay to PSEA—part of which go for services provided to bargaining units of health-care employees—"inure to the benefit" of the members of petitioners' bargaining units because these same services will be available to petitioners' bargaining units in another year when such services are needed.

Petitioners' request for review of this issue is wholly without substance.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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